IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

ORDER.

S.B. Civil Writ Petition No.5885/2005
Madan Lal vs. The State of Raj. &anr.

Under Article 226 of the Constitution of India.

Date of Order: October 27th,2005.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

Mr.Manish Shishodia for the petitioner.

Mr. I.R. for the respondent-caveator.

BY THE COURT:

By this writ petition, the petitioner has challenged the order dated 22.9.2005 by which the election tribunal ordered inspection of the votes casted in the election of the Sarpanch, in the election petition which is filed by the non-petitioner election petitioner.

The respondent-election petitioner filed election petition before the election tribunal with the allegation that the Returning Officer wrongly rejected ten valid votes of the election-petitioner and did not reject 5 invalid votes and they were counted in favour of returned candidate. The election tribunal recorded evidence of the parties and

thereafter observed that it is difficult to find out from the oral evidence about the correctness of the ballet papers and, therefore, ordered for inspection of the ballet papers.

According to the learned counsel for the petitioner in view of the settled law, the election tribunal cannot order to re-count or even inspection of the ballet papers merely on the basis of assumption that there might be something wrong in the ballet papers or on the ground that by inspecting the ballet papers, the position will be clear. It is also submitted that before ordering inspection of the ballet papers, the court must reach to the conclusion on the basis of the evidence produced by the parties that there is sufficient reason for inspecting the ballet papers. In this case, the court below has though recorded the evidence but has not recorded any finding that prima facie case has been made out by the election petitioner for ordering inspection of the ballet papers. Rather, if the election tribunal would have looked into the evidence, even of the election petitioner, the tribunal could not have ordered for re-count. The learned counsel for the petitioner also submitted that in fact the order passed by the court below is nothing but will amount to recounting of the votes by re-examining the validity of the votes. The learned counsel for the petitioner relied upon the judgment of the Hon'ble Supreme Court delivered in the case of Ram

Rati (Smt.) vs. Saroj Devi and others ((1997) 6 SCC 66) and submitted that for making ground for re-counting of the votes in the election petition, it is essential that the petitioner should have submitted application for re-counting before the Returning Officer at the time of counting of the votes and unless this requirement is fulfilled, re-counting cannot be ordered. It is also submitted that onus to prove the allegation is on the election-petitioner and Hon'ble the Apex Court held that re-counting cannot be ordered on mere asking or merely because of margin of votes between the returned candidate and the election petitioner is narrow. For this, the learned counsel for the petitioner relied upon the judgment delivered in the case of M. Chinnasamy vs. K.C. Palanisamy and others ((2004) 6 SCC 341). The learned counsel for the petitioner also submits that the election-petitioner was also under obligation for explaining sufficient reasons for not filing the application as laid down by the Hon'ble Apex Court delivered in the case of Chandrika Prasad Yadav vs. The State of Bihar and others ((2004) 6 SCC 331). It is also submitted that even if submitting of written application for re-counting before the Returning Officer is held not be be mandatory even then this is a circumstance to be taken note before ordering re-count or examination of ballet papers by the election tribunal. According to the learned counsel for the petitioner, it is clear from the impugned order of the election tribunal that the learned tribunal has

not considered the fact about the allegation of the petitioner that no application for re-counting was submitted by the election-petitioner.

The learned counsel for the respondents election-petitioner vehemently submitted that the inspection of the ballet papers can be ordered under Rule 53 of the Rajasthan Panchayati Raj (Election) Rules, 1994, therefore, the order passed by the court below is well within jurisdiction. It is also submitted that the election-petitioner submitted application before the Returning Officer for re-counting but the Returning Officer did not order for re-counting. The election-petitioner also placed on record the copy of the application which was submitted by the election petitioner before the Returning Officer.

The learned counsel for the respondent relied upon the judgment of this Court delivered in the case of Shanti Lal v. State of Rajasthan & ors. (1997 DNJ(Raj.) 170) wherein the difference of votes was only 14 and the tribunal ordered re-counting which was upheld by this Court. The learned counsel for the respondent also relied upon the judgment of the Hon'ble Apex Court delivered in the cases of I. Vikheshe Sema vs. Hokishe Sema ((1996) 4 SCC 53) and N.E. Horo vs. Leander Tiru and others (AIR 1989 SC 2023).

I considered the submissions of the learned counsel for the parties and perused the facts of the case. It is now well settled law that the election tribunal has power to order re-counting of the votes and as per Rule 53 of the aforesaid Rules of 1994, the court also can order for production and inspection of the ballet papers. It is also settled law that secrecy of the ballet papers cannot be disturbed only on the basis of mere allegation levelled by the election-petitioner. Hon'ble the Apex Court in the case of Chandrika Prasad Yadav (supra) held that absence of explanation for not submitting the application for re-counting at the time of the counting of the votes is a factor which may affect the prayer for accepting or rejecting the prayer for re-count in the proceedings before the tribunal where the re-counting is sought. Here in this case, the tribunal has not ordered for re-counting of the votes but has ordered inspection of the ballet papers which also may affect the secrecy of the ballet papers. The tribunal could have reached to the conclusion on the basis of the evidence prima facie, that the petitioner submitted the application for re-counting before the Returning Officer and on the basis of his oral evidence, he has made out a case for violating the secrecy of the ballet papers but in this case, the tribunal merely observed that it is difficult to assess oral evidence of both the parties and, therefore, the ballet papers are required to be inspected. If such plea be the ground for inspecting the ballet papers then that will be in all those cases when

there are allegations in the election petition of wrongful rejection or acceptance of the ballet papers. The election tribunal failed to apply its mind on evidence for the purpose for drawing inference for ordering inspection of the ballet papers. Therefore, the order of the election tribunal cannot be allowed to stand.

Hence the writ petition of the petitioner is allowed and the order dated 22.9.2005 is quashed and set aside.

(PRAKASH TATIA),J.

mlt.